

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

WILLIAM D SMITH

Claimant

VS.

SHERMAN CONSTRUCTION AND ROOFING

Respondent

AND

FIDELITY CASUALTY COMPANY OF NEW YORK

Insurance Carrier

Docket No. 198,066

ORDER

Claimant appeals from a February 23, 1995, Order of Administrative Law Judge Shannon S. Krysl which denied claimant's request for benefits.

ISSUES

On appeal, claimant contends the Administrative Law Judge exceeded her jurisdiction in denying benefits because the evidence establishes that claimant is entitled to medical and temporary total disability compensation as a result of a compensable work-related injury which arose out of and in the course of claimant's employment with the respondent. Respondent denies accident arising out of and in the course of employment and denies timely notice was given to respondent by claimant of his alleged accident. Respondent also raises the issues of whether the relationship of employee and employer existed between claimant and respondent and whether the parties are covered by the Kansas Workers Compensation Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs of the parties, the Appeals Board finds, for preliminary hearing purposes, as follows:

The finding by the Administrative Law Judge that claimant had not given timely and sufficient notice of accident to respondent as required by K.S.A. 44-520 and, further, that claimant had not proven that he met with personal accident arising out of and in the course of his employment with respondent should be affirmed. The weight of the credible evidence, including the medical records and reports, persuade the Board as the trier of fact that the claimant's injury did not occur in the manner to which claimant testified. The issue of whether claimant suffered personal injury arising out of and in the course of his employment with respondent, as with the issue of notice, turns primarily on the credibility and believability of the witnesses. The Administrative Law Judge had an opportunity to

observe the testimony of the witnesses. She determined the testimony of respondent's witnesses, as supported by the contemporaneous medical records, were more credible and believable than the testimony given by claimant and his witnesses. Based upon the Appeals Board review of the record as a whole, we find that the Order by the Administrative Law Judge should be affirmed.

In affirming the findings of the Administrative Law Judge concerning notice and accident arising out of and in the course of employment, the Appeals Board need not reach the additional issues raised by respondent concerning the employment relationship and the applicability of the Kansas Workers Compensation Act. This is not to say that respondent's position with regard to those issues are without merit. We neither agree nor disagree in this Order with the findings by the Administrative Law Judge as to those issues, as we need not reach them in order to decide this appeal.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the February 23, 1995, Order of Administrative Law Judge Shannon S. Krysl should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of May 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita KS
D. Steven Marsh, Wichita KS
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director